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IN THE

SUPREME COURT OF THE

UNITED STATES

No. A-287

MARTSAY BOLDER,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the imposition of capital punishment by the jury in the instant cause violated the petitioner's due process of equal protection rights under the Fifth and Fourteenth Amendments of the United States Constituion and the prohibition against cruel and unusual punishment contained in the Eighth Amendment of the United States Constitution when the jury was permitted to consider petitioner's previous conviction for murder during the penalty phase of the bifurcated proceeding following a finding beyond a reasonable doubt of one of the aggravating circumstances set forth in the Missouri statutory scheme.

2. Whether the imposition of capital punishment in the instant cause violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the cruel and unusual punishment clause of the Eighth Amendment to the Constitution of the United States and is disproportionate to the offense committed where the aggravating circumstance found by the jury was that petitioner was in a place of lawful confinement at the time of the murder.

Party Section

In the Supreme Court of Missouri, the parties were: Martsay Bolder, appellant and State of Missouri, respondent.

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RESPONSE TO PETITION FOR CERTIORARI

OPINIONS BELOW

Petitioner was convicted of the offense of capital murder, in violation of § 565.001, RSMo 1978, on May 6, 1980, following a jury trial. The jury assessed petitioner's punishment at death for the fatal stabbing of a fellow inmate at the Missouri State Penitentiary located in Jefferson City, Missouri. Petitioner filed a motion for a retrial on May 20, 1980, which was overruled on July 11, 1980. Petitioner was then sentenced to death in conformity with the jury verdict on that date by the trial court. Petitioner filed a notice of appeal on July 18, 1980, in the Missouri Supreme Court. The Missouri Supreme Court affirmed petitioner's conviction and sentence on July 6, 1982, and petitioner's motion for a rehearing was denied on August 2, 1982. The opinion of the Missouri Supreme Court affirming petitioner's conviction and sentence appears at 635 S.W.2d 673 (Mo. banc 1982). A copy of this opinion appears in Appendix A of the petitioner's petition for a writ of certiorari.

JURISDICTION

Petitioner claims that the imposition of the death penalty violates the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution as well as the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution, and therefore invokes this Court's jurisdiction under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner urges a violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment reads:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property with due process of law, nor deny any person within his jurisdiction the equal protection of the laws."

Petitioner urges that his rights under the Fifth Amendment of the United States Constitution were violated in that the due process and equal protection clauses of that amendment were not complied with in the imposition of his sentence. The Fifth Amendment to the United States Constitution reads in pertinent part as follows:

> "No person shall...be deprived of life, liberty or property without due process of law;...".

Petitioner also asserts a violation of the Eighth Amendment prohibition against cruel and unusual punishment which reads, "nor cruel and unusual punishment inflicted."

Petitioner alleges that his rights have been violated as his punishment is both excessive and disproportionate to the offense which he committed and the jury considered improperly a nonstatutory aggravating circumstance in assessing

the death penalty. The Missouri statutory scheme for imposition of the death penalty is comprised of several statutes which combine in an attempt to meet the requirements of this Court set forth in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Section 565.006, RSMo 1978, provides in pertinent part:

> "...2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section [finding of capital murder], the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolle contendre of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. ...Upon conclusion of the evidence and the arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed...."

Section 565.008, RSMo 1978, provides for the punishment of death if certain statutory provisions have been complied with. It reads:

> "1. Persons convicted of the offense of capital murder shall, if the judge or jury so recommends after complying with the provisions of § 565.006 and 565.012, be punished by death..."

Section 565.012, RSMo 1978, delineates the circumstances under which capital punishment may be imposed. In pertinent part, it reads as follows:

> "In all cases of capital murder for which the death penalty is authorized, the judge shall

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence,

(2) any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstances shall be limited to the following:

...(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinment;...

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed."

Section 565.014, RSMo 1978, places upon the Missouri Supreme Court the duty to review all death sentences. Subsection 3 of that statutory provision provides in pertinent part as follows:

"3. With regard to the sentence, the Supreme Court shall determine:

'1) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(2) whether the evidence supports the jury's or judge's findings of a statutory aggravating circumstance as enumerated in § 565.012; and

(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The Supreme Court of Missouri is empowered, by a constitutitional amendment to the Missouri Constitution, to establish rules relating to the procedure, practice and pleading for all courts and administrative tribunals. That provision is Article V, § 5, (Mo. Const.) and states:

"Rules of Practice and procedure-duty of Supreme Court-power of legislature. The Supreme Court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, right of trial by jury, or the right of appeal."

STATEMENT OF THE CASE

Charges against the petitioner arose out of the following events: On March 14, 1979, at approximately 3:15 p.m., Messrs Kenneth Gibbony and Arthur Luecke, teachers at the Missouri State Penitentiary located in Jefferson City, Missouri, were returning from Lincoln University where they had picked up some books from the penitentiary library in a truck (Transcript 155, 156, 175, 176-Transcript hereinafter referred to as Tr.). The two entered the penitentiary by the tunnel gate, and as Luecke drove the truck behind the ice plant and the 5A and B housing units through an area not visible from the guard towers (Tr. 212), Gibbony observed

the wall in a slight sitting up position and a second inmate, later identified as the petitioner (Tr. 159), standing over King making striking motions as King appeared to be moving and trying to get out of the way (Tr. 160). Petitioner was dressed in green pants and a red jogging jacket with a white stripe (Tr. 169, 184, 195, 205-206). Gibbony informed Luecke that he thought he saw two inmates fighting next to the building and Luecke stopped the truck. Luecke opened the door of the truck and got out and saw the petitioner standing over inmate King (Tr. 158, 177). A third inmate had come within two or three feet of the inmate sighted by Gibbony and then had dropped back with his arms spread apart approximately ten to fifteen feet (Tr. 159, 177). No one else was in the immediate area except these three inmates (Tr. 177), and the petitioner was the only inmate close enough to touch King (Tr. 186).

After the third inmate had approached petitioner and King, petitioner straightened up and turned towards the third inmate as that inmate dropped back. Petitioner then turned and walked slowly towards Housing Unit 5 A and B, going inside the unit after reaching the step entrace (Tr. 161, 178). Neither Luecke or Gibbony saw a weapon in the petitioner's hands (Tr. 173, 178), but Gibbony saw the appellant's right hand make jabbing motions towards King (Tr. 175).

Following petitioner's exit from the immediate area of this incident, King got up and started to walk towards the maintenance and machine shop in the penitentiary. Luecke saw blood on King's T-shirt and immediately pursued the petitioner into building 5A and B. Luecke estimated that he entered the A and B fifteen seconds after the petitioner (Tr. 178). Gibbony also saw that King was bleeding when King walked up to the truck. Officer Homer D. Jefferies saw inmate King come around the pickup truck at this time with blood running down his forehead and between his fingers where he was holding his stomach. Officer Jefferies went to

the aid of this inmate and asked, "who stuck him in" (Tr. 162, 188). Officer Jefferies then told Burt Johnson, a employee of the Missouri State Penitentiary, to go and get the petitioner who had gone into Housing Unit 5 (Tr. 189). Gibbony saw Burt Johnson enter Housing Unit 5A and B approximately 10 seconds after Luecke had entered that same building. King was then escorted to the prison hospital (Tr. 188).

When Luecke entered the building 5 A and B, he saw a stairway to the right of which was located a door to the prison school (Tr. 182). To the left of the stairway was a long corridor measuring approximately 8 to 10 feet wide and 200 feet long (Tr. 183, 198, 213). Luecke looked up the stairs, but did not see the appellant. He then looked down the left corridor and back up the stairs. The second time Luecke looked up the stairs he saw the appellant approximately half way up just past the landing (Tr. 183, 184).

Officer Johnson, responding to Officer Jefferies' order to enter Housing Unit 5A and B and get the petitioner entered that housing unit and saw the petitioner going up the steps (Tr. 193-194). But Johnson went up the steps and found the petitioner facing to the right of a desk, or standing behind the desk wiping blood from his hands with a handkerchief (Tr. 195, 196). No weapon was found on the petitioner (Tr. 184, 196). A weapon was found later behind a set of double metal doors to an old Jaycee room in the corridor to the left of the stairway in housing unit 5 A and B. The weapon found was a homemade knife (Exhibit 18) which had what was described by Dr. Alan Ray Doerhoff, M.D. fresh blood on it sometime within one to two hours of the alleged assault (Tr. 199, 214, 206, 251). The blade (Exhibit 18) measured 3/4 of an inch thick and over an inch wide (Tr. 210).

No weapon was found on the victim or in the immediate scene of the incident (Tr. 171, 188, 196, 197, 204). However, a plastic bag with writing paper was found in the area of the stabbing (Tr. 164, 189), and inside the plastic liner or

bag were papers with the name Martsay Bolder on them (Tr. 190-192).

After petitioner was removed from building 5 A and B, he was taken to the office of the investigator at the Missouri State Penitentiary named Urban Lock. Mr. Lock had received a call betwen 3:15 and 3:20 p.m. on March 14, 1979, to go to his office. He found the petitioner in his office wearing green pants and a grey sweatshirt with an orange or red type hood (Tr. 205). A visual examination of the petitioner by Lock revealed red spots on the petitioner's clothing that appeared to blood, a cut on the petitioner's index finger and a smear of blood on the petitioner's right hand (Tr. 207-209). Petitioner made statements to Mr. Lock following the giving of a Miranda warning which were admitted into evidence at the second phase of the bifurcated proceeding over petitioner's objection (Tr. 316).

Upon arrival at the hospital, victim King was examined by Dr. Richard K. Bowers, D.O., who discovered that King had suffered four lacerations, one to the left side of his forehead approximately 1 inch long, one on the right shoulder, approximately 2 inches long, one to the back of the right wrist 1 to 1 1/2 inches long and 1 to the abdomen measuring 3 inches long (Tr. 234-235). King had gone into a state of shock and Dr. Doerhoff, a consulting surgeon at the prison, was called. He responded to the page to report to the prison hospital immediately and arrived at approximately 3:45 p.m. (Tr. 241).

Dr. Bowers attempted to start an I.V. for fluids because of King's "shocking condition", and prior to Doerhoff's arrival, Dr Bowers, while wearing sterile gloves, checked the wound of the abdomen by placing his fingers into it to see how deep it ran (Tr. 237-238). Support measures were attempted for the victim such as placing him on oxygen, an attempted "cut down" into the arm, and the administration of medication to keep the blood pressure up in the attempted I.V. (Tr. 137-239). Dr. Bowers examined the victim without a cap, mask, or having dressed out as he stated there was not time (Tr. 239).

Dr. Doerhoff arrived and immediately went to the emergency room where he was met by Dr. Bowers, guards, the operating personnel and the patient. Dr. Doerhoff conducted a quick examination which revealed multiple stab wounds. At the time of his arrival, the operating crew was attempting to bring King out of shock by resuscitation. Dr. Doerhoff instituted tubes into the lungs and started additional I.V.s (Tr. 235, 242). The victim was not responding to any of the support measures and, as Dr. Bowers had indicated that the abdomen wound had penetrated the diaphram, Dr. Doerhoff assumed that a stab wound had occurred to the heart and opened the abdomen and chest a sufficient amount in the emergency room to get control of the situation by placing his hand at the bottom of the heart and pressing the heart against the chest wall. This massage stimulated the heart which had previously been barely beating. Prior to this massage, the victim had no blood pressure (Tr. 243). Once the heart had been stimulated, Dr. Doerhoff did his own examination of the wound to the stomach. His examination revealed to him a cut through the stomach, liver and a laceration almost an inch long to the inferior vena cava. The inferior vena cave is located near the backbone and just a little right of the center of the body (Tr. 244-246). Because of the size of the wound, and the realization of the location of the cut, Dr. Doerhoff clamped the inferior vena cava shut with his hand and held the pressure on it until the staff had moved the victim into the operating room. At this time, the victim was described as being essentially unresponsive. Dr. Doerhoff described the victim as "dead technically". Following the closing off of the vein, the victim responded enough that it was necessary to put him on an anthesia (Tr. 246).

During the treatment in the emergency room following the operation, the victim was given thirteen pints of blood. Three or four pints were given to the victim prior to the operation, two following the operation, and eight during the

operation (Tr. 249). The victim also required approximately 24 pints of other fluids (Tr. 249). Dr. Doerhoff testified that a similar injury to the vena cava with no other injuries involved is 90 percent fatal and that he could not recall any one surviving such a wound more than an hour without receiving medical attention (Tr. 250-251). Dr. Doerhoff also testified that when he began his surgical procedures, he was dressed in a scrub suit and white lab coat from St. Mary's Hospital with no mask or cap on, but with surgical gloves that were sterile (Tr. 254). Dr. Doerhoff stated that, "We had the choice of a sterile condition or a dead patient." (Tr. 255). Dr. Doerhoff then testified what impact the wound would have had on the body's priority system of shutting down certain organs in order to perserve the blood supply for other organs which are necessary for the immediate survival of the victim (Tr. 252).

The victim was moved to the University of Missouri Medical Center where other operations were performed upon him (Tr. 267, 268, 275-276). The victim subsequently died and Lowery Kercher Arnold, M.D., a pathologist, who conducted an autopsy on the victim on April 29, 1979, opined that the cause of death was "a generalized infection ultimately secondary to a stab wound in the abdomen" (Tr. 265, 276).

Petitioner adduced no evidence in his own behalf.

The jury retired and considered his verdict at 2:20 p.m. on May 6, 1979, and returned at 3:09 p.m. with the verdict of capital murder as submitted in state instructions no. 4 (Tr. 308).

After a brief recess, phase two of the bifurated proceeding was commenced. During this proceeding, certain exhibits were marked for identifications and admitted into evidence. One of these exhibits was a certified transcript of the serial record of the Missouri State Penitentiary pertaining to the petitioner and showing him that he had been received there on January 4, 1979, for the conviction of murder first

degree from the Jackson County Circuit Court and that the sentence was for life. Also, Harry Lauf, records officers at the Missouri State Penitentiary testified that on March 14, 1979, petitioner was a prisoner lawfully restrained within the Department of Corrections. (Tr. 315).

As already indicated, Urban Lock testified over the objection of the petitioner as to the conduct of a statement made by petitioner to this officer (Tr. 316). The admissibility of this statement is not here challenged, and a brief resuscitation of what petitioner stated to Urban Lock would suffice for the purposes of this response. Lock asked the petitioner if he had stabbed King and the petitioner replied yes. When asked why, the petitioner said that his brother, Martin Bolder, had been murdered in a time when King was his cell partner. The man who had murdered Martin was related to King and that after King moved out of the petitioner's cell, the petitioner learned that King had known the identity of Martin's assailant. Petitioner said that he had never forgiven King for not informing him of this. Also, petitioner stated that other inmates informed him that King was harassing Frank Lindsay, petitioner's new cell partner, following King's moving out of petitioner's cell. King was saying that Lindsay and the petitioners were having homosexual activities and relations and so the petitioner had beaten King up in a fist fight. Petitioner also told Lock that on March 14, he had been walking by the 5 B Housing Unit where King was sitting on a ledge. As petitioner walked by, King called him a "pussy assed nigger" which the petitioner did not like (Tr. 320). The petitioner then left and went to an upper yard to get a knife, put it in a plastic bag and returned to the area five to ten minutes later. He then asked King what he had said and King repeated it. Petitioner pulled out the knife and stabbed King. Lock stated that the petitioner seemed to be cool and calm at the time of the statements (Tr. 320-321).

The petitioner adduced no evidence in his own behalf at the penalty phase of the trial (Tr. 324).

Instruction No. 16 was read to the jury and the state and defense counsel made closing argument (Tr. 324-329). A recess was then called so that the jury could have dinner. Court reconvened at 7:40 p.m. and the jury was read the remaining instructions (Tr. 333). The instructions given to the jury in the penalty phase are attached hereto as Appendix A. The jury retired to consider what penaltys to assess at 7:53 p.m. and returned at 9:42 p.m., having assessed petitioner's punishment at death. The jury found the aggravating circumstance submitted in instruction no. 18, that the petitioner was in custody in a lawful place of confinement when he committed the murder. The jury also found beyond a reasonable doubt that the petitioner had a prior criminal conviction for murder in the first degree and it "appears the life sentence was no deterrent to further crime" (Tr. 334; Appendix A). A motion for retrial was filed by defense counsel on May 20, 1980, following the filing of a motion for a new trial pro se by the petitioner. The motions for new trial were overruled on July 11, 1980, and petitioner was sentenced to death in conformity with the jury verdict on that date. Petitioner then appealed his conviction to the Supreme Court of Missouri which affirms said conviction on July 6, 1982, having found that the penalty was not disproportionate to the crime under the Supreme Court statutory duty to review each death sentence (petition for writ of certiorari appendix A). Petitioner now seeks a writ of certiorari in this court.

ARGUMENT

THE JUDGEMENT OF DEATH IMPOSED AGAINST PETITIONER IS NOT EXCESSIVE NOR DISPROPORTIONATE, NOR VIOLATIVE OF ANY OF HIS CONSTITUTIONAL RIGHTS, AS THE JURY'S VERDICT FORM SPECIFICALLY SET OUT AN AGGRAVATING CIRCUMSTANCE ENUMERATED IN § 565.012.2(1-10), RSMo L(&*, WHICH WAS FOUND BY THE JURY BEYOND A REASONABLE DOUBT, AS WELL AS ANOTHER AGGRAVATING CIRCUMSTANCE AUTHORIZED BY LAW WHICH WAS FOUND BY THE JURY UNANIMOUSLY AND BEYOND A REASONABLE DOUBT, WHICH SHOWS THAT THE JURY FOLLOWED THE GUIDELINES GIVEN TO IT BY THE COURT IN TAILORING ITS SENTENCE TO THIS PARTICULAR DEFENDANT IN LIGHT OF THE CRIME COMMITTED.

In his petition for a writ of certiorari, petitioner contends that his sentence of death is unconstitutional as the jury went outside its instructions and found an aggravating circumstance not set forth in § 565.012.2(1-10), supra, and that the aggravating circumstance found by the jury and contained in that statutory provision that this offense was committed while the petitioner was in a place of lawful confinement subjects him, because of his status alone as an inmate, to a more severe penalty than any other member of society. Petitioner invites this court to review his death sentence and make it clear to all the courts in and various the states that a sentence of death "based upon wide jury discretion and faulty findings" is constitutionally infirm. Respondent contends that the sentence of death is not disproportinate nor excessive given this particular petitioner and the crime committed, and the jury correctly followed its guidelines contained in the statutory scheme enacted in Missouri which is similar, if not identical, to that scheme previously examined by this court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In the instant cause, petitioner was convicted of capital murder of a fellow inmate at a time when the state's evidence showed that both were incarcerated at the Missouri State Penitentiary. Following the finding of guilt, the

second phase of the bifurcated system provided for by the Missouri statutes commenced. At that point in petitioner's trial, evidence of his prior conviction for murder first degree and the life sentence imposed was presented to the jury. Also presented was petitioner's own statement of what had occurred just prior to the murder between himself and the murder victim. An examination of the verdict form returned by the jury demonstrates that they did find an aggravating circumstance set forth in § 565.012.2 beyond a reasonable doubt. That aggravating circumstance being that "the capital murder was committed by a person in...the lawful custody of a peace officer a place of lawful confinement". Once the jury was required to find beyond a reasonable doubt an aggravating circumstance and found that aggravating circumstance beyond a reasonable doubt, it is permitted to consider the punishment of death. However, just as in the statutory scheme found constitutional in Georgia, a jury in Missouri may not assess the penalty of death unless it finds beyond a reasonable doubt one of the ten aggravating circumstances in the scheme to exist. Thus, the aggravating circumstance is not itself sufficient to justify imposition of the death, but serves as a threshold requirement to consideration of the penalty. Such was the case in Spinkellink v. Wainwright, 578 F.2d 582, 609 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), reh. denied, 441 U.S. 937 (1979).

The purpose of the aggravating circumstance in the statutory schemes is to narrow the number of cases in which the death penalty may be considered and to create a meaningful distinction between the case wherein a death penalty may be imposed without being done so arbitrarily from those cases where it is not to be imposed. Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 49 L.Ed.2d 973 (1976). Respondent suggests at first that the Missouri statutory scheme properly "guides and focuses the jury's objective consideration of the "'individual offense and the individual offender before

it can impose the sentence of death." See Jurek v. Texas, 428 U.S. 262, 274, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

Prior to imposing the death sentence upon any defendant, the constitution of the United States requires that a process be used which accords significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense. Woodson v. North Carolina, 428 U.S. 280, 304-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Respondent suggests to this Court that allowing the jury to consider prior convictions of a defendant against whom a death penalty is sought is relevant and just the type of facet of character and history as this court suggested was necessary to determine whether or not a death sentence was appropriate in Woodson v. North Carolina, supra.

That the jury which assessed the petitioner's penalty at death was not permitted to impose a sentence in violation of its guidelines from the Court may be seen by reviewing the instructions which the Missouri Supreme Court has prepared pursuant to its constitutional authority. (Appendix A). In a separate instruction, the jury was informed that it could consider the appellant's prior criminal conviction for murder and use that as an additional aggravating circumstance if it so desired. However, the jury was charged only to consider the circumstance of prior criminal conviction for the murder in the event that it had found the aggravating circumstance existing in instruction no. 18. Thus, the jury was required, before it could impose death, to meet the threshold requirement of finding an aggravating circumstance as submitted in Instruction No. 18 beyond a reasonable doubt. Respondent submits to this Court that a prior criminal conviction for murder is not extenuating or mitigating, but rather an aggravating circumstance properly instructed upon under § 565.006.2 and 565.012.1(3), supra. Petitioner has ignored the requirement of § 565.012.1(3), supra, that the

judge include in his instructions for the jury to consider "any mitigating or aggravating circumstances otherwise authorized by law." In § 565.006.2, evidence of the defendant's prior criminal record and any criminal convictions is to be admitted at the hearing on punishment. It is clear from the reading of these two sections of the Missouri statutory scheme that the death penalty may be imposed only if one of the statutory aggravating circumstances set forth in § 565.012, is first found to exist by the jury. The jury is then permitted to consider prior criminal convictions as an aggravating circumstance otherwise authorized by law. The jury in the case at bar found beyond a reasonable doubt that the petitioner was a prisoner at the Missouri State Penitentiary at the time that he committed an assault upon Theron King resulting in King's death. The jury also found that petitioner had previously been convicted of murder first degree.

Respondent submits that the verdict of death is not the result of the jury going beyond the instructions given to it by the trial court as the instructions directed the jury's attention to first an aggravating circumstance set forth in § 565.012(9), supra, and then to petitioner's prior criminal record.

Before a death penalty may be imposed, it is necessary that the penalty be tailored after a "jury's objective consideration of the particularized circumstances of the individual offense and the individual offender..." Jurek v. Texas, supra. If a capital sentencing procedure properly guides and focuses the jury's consideration upon the individual offender and his crime, it will pass constitutional muster. The end sought when setting up proper guidelines for the trier of fact's determination of the appropriate penalty is a meaningful distinction being drawn between the case where the death penalty may be imposed and one where it cannot be imposed without being done so arbitrarily. Proffit v.

Florida. supra. Respondent suggests that a simple reading of the jury's verdict assessing the death penalty, which is included at the end of this response as appendix B, clearly indicates that the jury followed its instructions and tailored its punishment for this particular defendant. The jury wrote, at the bottom of its verdict form, the following:

> "We have unanimously determined that at the time of the murder of Theron King, the defendant was in the lawful custody of a place of confinement submitted in instruction no. 18. We have also found without reasonable doubt that the defendant has a prior criminal conviction for murder in the first degree, and appears the life sentence was no deterrent to further crime."

Given this language at the bottom of the verdict form, and considering the complete message written on the verdict form by the jury, it surely cannot be said that the jury went beyond its instructions by considering an aggravating circumstance created by itself. Rather, this jury followed the Missouri statutory scheme which directs and focuses the jury's attention upon facets of the character of the defendant and the particular offense committed. Thus, the respondent suggests to this Court that petitioner's first argument as to why he should be granted a writ of certiorari for review by this court is without merit. This is so given the nature and the purpose of aggravating circumstances which is not themselves to be sufficient to impose the death sentence, but to provide a threshold requirement before the jury may even consider a death penalty.

Even assuming that the jury imposed the death sentence in this case soley on petitioner's status as an inmate and were permitted to do so by the instructions, it was recognized that this is an appropriate penalty for prison murders in Gregg v. Georgia, 428 U.S. 153, 185-186, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The jury obviously considered the individual for it to have imposed punishment as is indicated by the note at the bottom of the verdict form. Additionally, as this court suggests that a state may be justified in requiring

a mandatory capital penal for this type of crime and criminal, Woodson v. North Carolina 428 U.S. at p. 287, n. 7, respondent suggests that petitioner has suffered no violation of his federal constitutional rights which would require a granting of a writ of certiorari for the review of his sentence of death.

THE JUDGEMENT OF DEATH IS NOT EXCESSIVE, DISPROPORTINATE, OVERBROAD OR OVERINCLUSIVE NOR VIOLATIVE OF ANY OF PETITIONER'S RIGHTS AS IT WAS NOT IMPOSED SOLELY AS THE RESULT OF FINDING THAT THE PETITIONER WAS A PERSON LAWFULLY CONFINED IN A PLACE OF INCARCERATION AS THAT IS ONLY A THRESHOLD REQUIREMENT BEFORE THE JURY MAY CONSIDER THE DEATH PENALTY UNDER THE MISSOURI STATUTORY SCHEME AND THE JURY IN THE INSTANT CAUSE WAS SO INSTRUCTED.

As petitioner correctly points out, one of the aggravating circumstances set forth in § 565.012.2(9), supra, is that the "capital murder was committed by a person in...the lawful custody of a peace officer or place of lawful confinement." However, respondent disagrees with petitioner's assertion that this aggravating circumstance subjected petitioner, merely because of his status as an inmate. to a more severe penalty than any other member of society regardless of the nature of the crime. As previously pointed out, a review of the instructions given to the jury in this case, which were prepared by the Missouri Supreme Court in accordance with the constitutional authority and which are reproduced for this Court's convenience as Appendix A of this response, will demonstrate that the jury was informed that they must first find that petitioner was lawfully incarcerated at the time of the offense before it could consider the death penalty. The jury was informed further that it must unanimously decide that the death penalty was an appropriate punishment for this petitioner before it could impose the death sentence. The jury was informed of a prior convicition of petitioner's

during the hearing on the penalty to be imposed. The jury was required before it could consider that prior conviction to find unanimously that the petitioner did have a prior conviction for murder. On the bottom of the verdict form, the jury wrote that a life sentence had deterred petitioner from committing the murder. Respondent takes exception with petitioner's interpretation of the language appearing at the bottom of the verdict form and suggest to this court that this message from the jury clearly indicates an intention to tailor the punishment to the petitioner given his reaction to a prior life sentence being imposed for a homicide of the same nature and quality as the instant offense, but not labeled as capital murder. Given that this was a murder by one who had already been found guilty of murder in the first degree and received a life sentence, respondent suggests to this court that petitioner was not sentenced as a result of his status and the Missouri statutory scheme does not permit same. The examination of the instructions as set forth and promulgated by the Missouri Supreme Court in accordance with the plain language of §§ 565.006, 565.012, and 565.014, supra, supports this assertion. Respondent suggests to this Court that petitioner is not entitled to the issuance of the writ of certiorari for the review of his death sentence.

CONCLUSION

In view of the foregoing, the respondent respectfully submits that petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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INSTRUCTION NO. 13

You have found the defendant guilty of capital murder. At this stage of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for capital murder is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole until the prisoner has served a minimum of fifty years of his sentence.

Given
5/4/00
AGS

INSTRUCTION NO. 14

This stage of the trial will proceed as follows:

First, the Court will read to you one further instruction of law for your guidance. Next, the attorney for the state must make an opening statement outlining what evidence the state expects to introduce at this time with respect to the punishment to be imposed. The defendant's attorney is not required to make an opening statement then or at any other time. However, if he chooses to do so, he may make an opening statement after that of the state, or he may reserve his opening statement until the conclusion of the state's evidence.

Evidence will then be introduced which, with the evidence you have already heard, may be considered by you insofar as it bears upon the punishment to be fixed by the jury.

Next, the attorneys may make their arguments to you regarding the punishment to be imposed, after which the Court will read to you further written instructions concerning the law applicable to this stage of the proceedings.

You will then be given the written instructions of the Court to take with you to your jury room. You will go to that room, deliberate and arrive at your verdict fixing the punishment to be imposed upon the defendant.

Given
5/4/80

INSTRUCTION NO. 15

It is your duty to follow the instructions and the law as the Court gives them to you. However, no statement, question, ruling or remark that I have made or may make during the entire trial is intended to indicate my opinion of what the facts are or what the punishment should be. That will be your responsibility. In performing that duty you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

You will recall that the Court told you at the first stage of this trial that you must not assume as true any fact solely because included in or suggested by a question asked a witness. A question is not evidence, and may be considered only as it supplies meaning to an answer.

Given
1-28.

INSTRUCTION NO. 14

You will now hear argument by the prosecuting attorney and by counsel for the defendant regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed by the evidence as you remember it, the reasonable inferences which you believe should be drawn, and the law as given in instructions of the Court.

After counsel have argued the matter, the Court will give you further and final instructions concerning the law relating to the punishment to be imposed upon the defendant and to render such verdict under the law and the evidence.

The state's attorney must open the argument. Counsel for the defendant may then make his argument. No further argument is permitted by either side.

Given
5/4/80
SEA

INSTRUCTION NO. 17

The law applicable to this stage of the trial is stated in these instructions and those which were read to you when we began this phase of the case. All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

5/4/89

INSTRUCTION NO. 18

In determining the punishment to be assessed against the defendant for the murder of Theron King, you must first unanimously determine whether at the time of the murder of Theron King the defendant was in the lawful custody of a place of confinement.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt the foregoing circumstance and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that the foregoing circumstance exists and that it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

INSTRUCTION NO. 19

If you find and believe from the evidence beyond a reasonable doubt that the circumstance submitted in Instruction No. 18 exists and that it is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of defendant. In deciding that question you may consider all of the evidence relating to the murder of Theron King.

You may also consider the aggravating circumstance referred to in Instruction No. 15 which you found beyond a reasonable doubt.

You may also consider the following circumstance if you find from the evidence beyond a reasonable doubt that it exists and that it is an aggravating circumstance: that the defendant has a prior criminal conviction for murder in the first degree.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Given
5/4/90

INSTRUCTION NO. 20

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death, as submitted in Instruction No. 19, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Theron King.

You may also consider any circumstances which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence.

Given
5/4/80
8:27

INSTRUCTION NO. 21

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

Given
5/4/89
PSA

INSTRUCTION NO. 22

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Theron King, your foreman must write into your verdict the aggravating circumstance submitted in Instruction No. 18 which you found beyond a reasonable doubt. In addition, your foreman must write into your verdict the other specifically mentioned aggravating circumstance submitted in Instruction No. 19 which you found beyond a reasonable doubt.

If, after considering all of the evidence and instructions of law, you decide that the defendant must be punished for the murder of Theron King by imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of fifty years of his sentence, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the court will fix the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a mininum of fifty years of his sentence. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.

Sworn

VERDICT

Jurors: Use this form only if the punishment fixed by you is death. See Instruction No. 22 for directions as to what must be written into the verdict form if the death penalty is imposed. Use the reverse side of this form if necessary. The foreman's signature must appear at the end of the matter which you designate in writing as the aggravating circumstance or circumstances which all twelve jurors found beyond a reasonable doubt.

We, the jury, having found the defendant guilty of the capital murder of Theron King, fix the defendant's punishment at death, and we designate the following aggravating circumstance or circumstances which we find beyond a reasonable doubt:

~~that it was an aggravating circumstance~~
We the jury unanimously determine at the time of the murder of Theron King the defendant was on the lawful custody of a place of confinement committed in Crockett Co. We the jury also find unanimously that the defendant has a prior criminal conviction for murder in the first degree and appears the life criminal conduct with no intent to further crime

Foreman
Victor E. Nicholson

END OF DOCKET